the interpretation given to the phrase "illicit trafficking in a controlled substance" by the circuit in which they sit.[5] DHS may detain a non-citizen in any detention facility in the country; that non-citizen will be forced to appear before an immigration judge while in detention. Given the current splits among the circuits, DHS' practice of detaining non-citizens in facilities throughout the country, without regard to the state in which they reside or the state in which the conviction occurred, means that any circuit's rule may apply to any one individual.

Non-citizens placed in detention in New York, for example, are commonly transferred to Passaic, New Jersey (with hearings before immigration judges in New York City, in the Second Circuit), York, Pennsylvania (Third Circuit), or Oakdale, Louisiana (Fifth Circuit). Each of these jurisdictions applies a different rule regarding whether and under what circumstances a state misdemeanor drug possession conviction may constitute an aggravated felony. As a result, a New York resident will face wildly different immigration consequences depending solely upon where the government chooses to detain her. A long-time lawful permanent resident with U.S. citizen children who has a New York misdemeanor possession conviction, if detained in Louisiana, may be deemed to have been convicted of an aggravated felony and denied any possibility of relief from removal. The same person convicted of the same misdemeanor offense, if detained in Pennsylvania, will be eligible for cancellation of removal, permitting her to remain in the United States to care for her children.

Furthermore, individuals are commonly detained in several different circuits during the course of the removal process. A

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[5] *Yanez-Garcia*, 23 I. & N. Dec. at 396.

typical scenario involves a New York resident, convicted in New York and arrested by immigration officials at the probation office, transferred to a county jail in New Jersey, where he may or may not see an immigration judge for a bond hearing, and finally transferred to Oakdale. Family members in New York are likely to contact New York attorneys and advocates on his behalf, while the non-citizen himself may speak with an attorney in New Jersey before proceedings finally commence in Louisiana. Due to the split among the circuits, any legal advice he or his family receives becomes useless as soon as he is transferred to a facility in another circuit.

DHS detains many non-citizens whose lives are affected by the application of the aggravated felony label to drug possession misdemeanor convictions. DHS detains these non-citizens for a number of different reasons. DHS takes the position that any non-citizen who has spent one day or more in jail since 1998 on a drug conviction is subject to mandatory detention.[6] Furthermore, DHS may detain a non-citizen U.S. resident who travels outside the country upon her attempted return to the United States if she is found inadmissible as a result of a prior conviction. A non-citizen may also be detained due to a prior conviction if he or she comes to the attention of DHS through an application for a new immigration status, such as naturalization. Lastly, non-citizens seeking asylum in the United States may be subject to detention while their asylum applications are processed.

As detention plays a growing role in immigration enforcement, the lack of predictability within the law becomes increasingly troubling. The numbers of non-citizens detained through these different routes has risen steadily in the past ten years. From 1996

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[6] *In re Adeniji*, 22 I. & N. Dec. 1102, 1107–11 (BIA 1999).

to 2004, the size of the daily population in DHS detention facilities increased by more than 150%, from 9,011 in 1996 to 22,812 in 2004.[7] Over the course of a given year, hundreds of thousands of non-citizens will be detained. In 2002, DHS detained approximately 202,000 non-citizens. Of this number, DHS asserts approximately 103,000 had criminal records.[8] As a result of the split among the circuits, each of these non-citizens is unable to predict the devastating immigration consequences that could follow from a misdemeanor conviction, because those consequences depend entirely on where the non-citizen is detained.

II. RESOLUTION OF THE SPLIT AMONG THE CIRCUITS IS WARRANTED BECAUSE IT CONCERNS THE APPLICATION OF IMMIGRATION LAW'S MOST SEVERE PENALTIES

Virtually every non-citizen convicted of a drug offense is deportable.[9] Congress has chosen to lessen the dramatic impact of

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[7] ALISON SISKIN, CONGRESSIONAL RESEARCH SERVICES, IMMIGRATION-RELATED DETENTION: CURRENT LEGISLATIVE ISSUES 12 (2004), *available at* http://www.fas.org/irp/crs/RL32369.pdf. DHS' Bureau of Immigration and Customs Enforcement (ICE) operates eight detention facilities around the country, and augments the capacity of its own detention facilities with an additional seven contract detention facilities. ICE also uses state and local jails on a reimbursable basis, joint federal facilities with the Bureau of Prisons, the Federal Detention Center in Oakdale, Louisiana, and a contractor owned and operated facility in Eloy, Arizona. U.S. ICE Office of Detention and Removal (DRO), http://www.ice.gov/graphics/dro/ (last visited Nov. 9, 2005).

[8] SISKIN, *supra* note 7, at 12.

[9] 8 U.S.C. § 1227(a)(2)(B) ("Any alien who at any time after admission has been convicted of a violation of . . . any law or regulation of a State, the United States, or a foreign country relating to a controlled substance . . . other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.").

this law by allowing immigration judges to find that certain non-citizens are eligible for cancellation of removal, asylum, or a family hardship waiver if they can prove sufficient positive equities or threat of persecution upon removal. The aggravated felony determination acts as a per se bar to these forms of relief, preventing immigration judges from granting relief even for those non-citizens whose continued presence here would benefit the United States. As a function of the circuit split, the profoundly life-altering consequences of the aggravated felony label are applied inconsistently throughout the country.

A non-citizen convicted of a crime deemed an aggravated felony may find herself unable to obtain any relief from removal, no matter how compelling her circumstances. As a result of the current split among the circuits, two non-citizens convicted of the same crime in the same state may face dramatically different immigration consequences. The application of the aggravated felony label to immigrants with misdemeanor drug possession convictions means that non-citizens who served in the Armed Forces, and have U.S. citizen family members, will be exiled from the United States without regard for the hardship caused to themselves or their families. Furthermore, non-citizens who could otherwise naturalize may be permanently barred from U.S. citizenship as a result of misdemeanor drug possession convictions. Other non-citizens, even those convicted of the same misdemeanor offense in the same state, will be eligible for relief from removal, asylum, or citizenship solely because they happen to be detained or are required to make their application in another circuit.

A. An Aggravated Felony Conviction Bars An Immigration Judge From Exercising Discretionary Authority To Permit A Non-Citizen To Remain In The United States

Because Congress has long recognized that removal has dramatic and devastating consequences for non-citizens and their families, the Immigration and Nationality Act contains several provisions that empower judges to grant discretionary relief from removal to otherwise deportable or inadmissible non-citizens based on their individual circumstances. Non-citizens with misdemeanor drug possession convictions, including lawful permanent residents who have lived in the United States for many years, will be ineligible for almost all of these forms of relief if they appear before an immigration judge in a jurisdiction where their offense is considered an aggravated felony.

Lawful permanent residents who are deportable are eligible for cancellation of removal if they have been lawfully admitted as permanent residents for at least five years and have spent seven continuous years in the United States. 8 U.S.C. § 1229b(a). Receipt of cancellation of removal depends upon the non-citizen's ability to show compelling reasons why she should be permitted to remain in the United States. Cancellation of removal has traditionally been an important form of relief for lawful permanent residents who have lived in the United States for most of their lives and lack meaningful ties to their home country, who have served in the U.S. Armed Forces, whose families would suffer if they were deported, or who can show proof of rehabilitation and good character.

Family hardship waivers are an important form of relief for lawful permanent residents who are otherwise inadmissible. In order to qualify for relief under this provision, a lawful permanent resident must show seven years of continuous residence in the

United States and that denial of admission would result in extreme hardship to a spouse, parent or child who is a U.S. citizen or lawful permanent resident. 8 U.S.C. § 1182(h).

Lawful permanent residents are statutorily barred from obtaining cancellation of removal or a family hardship waiver if they have been convicted of an aggravated felony. *See* 8 U.S.C. § 1229b(a)(3); 8 U.S.C. § 1182(h). Application of the aggravated felony label to a misdemeanor drug possession offense therefore prohibits an immigration judge from considering even the most compelling individual circumstances and requires the removal of individuals who would otherwise qualify for the relief that Congress has made available.[10]

B. An Aggravated Felony Conviction Bars An Immigration Judge From Granting Asylum To A Non-Citizen Who Has Suffered Or Will Suffer Persecution In Her Country Of Origin

Individuals who have suffered past persecution or who face a well-founded fear of future persecution in their home countries are eligible for asylum in the United States. For immigrants who cannot return to their countries of origin, asylum is a route to permanent residency and eventually U.S. citizenship. Immigrants who have been convicted of a "particularly serious crime,"

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[10] A non-citizen with an aggravated felony conviction is also ineligible for voluntary departure in lieu of an order of removal. *See* 8 U.S.C. § 1229c(b)(1)(C). This form of discretionary relief allows a non-citizen to avoid the stigma and harassment of removal proceedings, and permits her to leave within a designated period of time, giving her an opportunity to tie up her affairs in the United States before departure. Voluntary departure also allows a non-citizen to choose to return to a country other than her country of origin in order to avoid persecution.

however, are statutorily barred from eligibility for asylum, and such forms of relief may even be revoked based on their convictions. 8 U.S.C. § 1158(b)(2)(A)(ii) & (c)(2)(B). An individual convicted of an "aggravated felony" is automatically deemed to have been convicted of a "particularly serious crime," and therefore is statutorily barred from obtaining asylum. 8 U.S.C. § 1158(b)(2)(B)(i). An immigration judge presiding over such a case lacks any discretion whatsoever to grant asylum, regardless of how great the danger of persecution the non-citizen would face if returned to her home country.

C. An Aggravated Felony Conviction May Bar An Otherwise Eligible Non-Citizen From Naturalization

In order to naturalize and become a U.S. citizen, a non-citizen ordinarily must establish, among other things, that she has been a person of "good moral character" within the past five years before applying to naturalize, and that she has continued to exhibit good moral character while the naturalization application is pending. 8 U.S.C. § 1427(a). In contrast, a non-citizen convicted of an aggravated felony after 1990 is permanently barred from naturalization because the Immigration and Nationality Act precludes any such individual from establishing good moral character. 8 U.S.C. § 1101(f)(8).

III. Resolution Of The Split Among The Circuits Is Warranted Because The Aggravated Felony Label In Some Circuits Applies To Low-Level Misdemeanor Convictions, Many Of Which Were Adjudicated In A Summary Fashion Without Any Contemplation That Serious Consequences Would Attach To The Disposition

The Fifth Circuit's *Sanchez-Villalobos* decision, which states that even a misdemeanor drug possession offense could be deemed an aggravated felony, illustrates the broad sweep of the "either state or federal felony" offense approach to the aggravated felony label. This broad application leads to far harsher consequences than those contemplated by misdemeanor defendants and their representatives at the time of conviction.

The New York criminal justice system demonstrates how the rule endorsed by the Fifth Circuit in this case threatens non-citizen defendants with consequences far greater than can possibly be justified by the procedural protections they received in the criminal justice system. The New York example is particularly relevant because non-citizens with New York misdemeanor convictions are regularly detained and placed in removal proceedings in other jurisdictions, including the Fifth Circuit. These New Yorkers face dramatic immigration consequences despite New York State's minimal procedural protections for misdemeanor defendants.

In New York State, defendants facing misdemeanor convictions are processed at a rate that reflects the minimal consequences the state expects to follow such convictions. A New York State misdemeanor drug possession conviction rarely results in incarceration. For example, there were 258,655 convictions for Criminal Possession of a Controlled Substance in the Seventh Degree, a misdemeanor under New York law, between 1995 and 2004. Of this number, almost sixty percent resulted in

sentences of time served, probation only, conditional discharge, or fines. Of the remainder, the median length of sentence imposed was between nineteen and twenty days.[11]

New York's quality of life policing campaign has had a tremendous impact on the number of misdemeanor drug cases heard in its criminal courts.[12] In 1994, for example, there were 56,256 misdemeanor drug arrests in New York State.[13] By 2001, the number of misdemeanor drug arrests had reached 363,269, as compared to 169,944 felony drug arrests.[14] In New York City, quality of life policing led to a sixty percent increase in misdemeanor arraignments in the City's Criminal Courts between 1992 and 2002.[15] The sheer number of misdemeanors processed in

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[11] NEW YORK STATE DEFENDERS ASSOC., ANALYSIS OF NEW YORK STATE DIVISION OF CRIMINAL JUSTICE SERVICES MISDEMEANOR DRUG OFFENSE STATISTICS FOR THE YEARS 1995 THROUGH 2004 (2005), http://www.nysda.org/NYSDA_Resources/Immigrant_Defense_Project/05_Analysis_NY_misde-meanor_drug_offense_data_10_05.pdf. A person is guilty of criminal possession of a controlled substance in the seventh degree when he knowingly and unlawfully possesses a controlled substance. N.Y. Penal Law § 220.03 (2005).

[12] *See* HON. JUDITH S. KAYE, THE STATE OF THE JUDICIARY 2004, at 7 (2004), http://www.courts.state.ny.us/ctapps/soj04.pdf.

[13] New York State Div. of Criminal Justice Servs., Adult Arrests: N.Y. State by County and Region 1994, http://criminaljustice.state.ny.us/crimnet/ojsa/arrests/year1994.htm (last modified July 21, 2005).

[14] OFFICE OF NATIONAL DRUG CONTROL POLICY, STATE OF NEW YORK PROFILE OF DRUG INDICATORS 5 (April 2003).

[15] Martha Rayner, *New York City's Criminal Courts: Are We Achieving Justice?*, 31 FORDHAM URB. L.J. 1023, 1026 (2004).

New York State criminal courts requires attorneys and judges to prioritize speed and efficiency.

Most misdemeanor offenses are processed extremely quickly and without substantial procedural protections, with the understanding that serious direct and collateral consequences will not follow from a conviction. Outside of New York City, misdemeanor cases may be heard by Town or Village justices or police court judges, many of whom are not lawyers.[16] In New York City, misdemeanors are prosecuted in Criminal Court, where defendants may find themselves arraigned before Civil Court judges, who are unfamiliar with criminal law and procedure.

Defendants facing misdemeanor charges can and often do plead guilty at arraignment, and many have their cases arraigned, pled, and sentenced on the same day.[17] In New York City in 1998, seventy-three percent of non-felony Criminal Court arraignments resulted in a determinative outcome.[18] Because every judge in New York Criminal Court handles, on average, more than 5,000 cases per year, judges can often spend only minutes per case.[19] Likewise, neither the defense nor the prosecution has the time to investigate the merits of each case. In New York City, indigent

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[16] New York Judicial Selection, http://www.ajs.org/js/NY_methods.htm (last visited Nov. 9, 2005).

[17] *See* N.Y. STATE BAR ASS'N, THE COURTS OF NEW YORK: A GUIDE TO COURT PROCEDURES 17–18 (2001).

[18] FREDA F. SOLOMON, N.Y. CRIM. JUST. AGENCY, INC., THE IMPACT OF QUALITY OF LIFE POLICING: HOW THE NYPD'S NEW POLICING STRATEGY OF THE 1990S AFFECTED ARRESTS, DEFENDANTS AND THE CRIMINAL COURTS 5 (2003). A determinative outcome includes dismissal of charges.

[19] Daniel Wise, *Caseloads Skyrocket in Brooklyn Courts: Upswing Linked to NYPD Narcotics Investigation*, N.Y. L.J., May 22, 2000, at 1.

defendants may speak to a defense attorney for the first time only minutes before arraignment. This situation is not limited to New York City, however. A 2003 survey by the NAACP Legal Defense and Education Fund found that many misdemeanor defendants in Schuyler County, New York, accept guilty pleas without ever speaking to a lawyer.[20]

As is true throughout the country, the New York State court system has come to rely heavily on plea bargaining to decrease the administrative burden of trying an ever-increasing number of defendants. Given the enormous volume of misdemeanor cases heard in Criminal Court, prosecutors, defense attorneys, judges and defendants alike are under enormous pressure to reach a plea agreement at arraignment. If no plea agreement is reached, misdemeanor cases join a massive backlog of similar cases. The Honorable Judith S. Kaye, Chief Judge of the State of New York, noted in her 2004 State of the Judiciary report that "tens of thousands of misdemeanor cases remain pending for months, even years, while felony filings decline."[21] Low-income defendants feel intense pressure to plead guilty at arraignment because proceeding with their cases means their cases will drag on for significant periods of time, forcing them to attend numerous court appearances which interfere with work and family obligations.[22]

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20 NAACP LEGAL DEF. AND EDUC. FUND, THE STATUS OF INDIGENT DEFENSE IN SCHUYLER COUNTY 10–11 (2003).

21 KAYE, *supra* at 7.

22 Rayner, *supra* note 15, at 1055 ("[T]he duty of many court appearances results in pressure on defendants to plead guilty to end the court appearances.").

The pervasiveness of plea bargaining was noted over twenty years ago by the Association of the Bar of the City of New York, which stated, "If you tell people that several months went by recently in Brooklyn Criminal Court without a single person being tried for anything they will tell you, quite correctly, that you are talking about something which is not a court."[23] At that time, only one-half of one percent of misdemeanor cases went to trial.[24] The situation has only gotten worse: in 2003, the New York City misdemeanor trial rate was less than one third of one percent.[25]

New York State is not alone in processing misdemeanor drug possession offenses rapidly, primarily through plea bargains, and without substantial procedural protections. As a result of the current confusion among the circuits as to the appropriate application of the aggravated felony label, non-citizens with state-level misdemeanor drug possession convictions will face consequences far more serious than are merited by the perfunctory treatment their cases receive.

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[23] CRIMINAL COURTS COMM. OF THE ASS'N OF THE BAR OF THE CITY OF N.Y., SAVING THE CRIMINAL COURT: A REPORT ON THE CASELOAD CRISIS AND ABSENCE OF TRIAL CAPACITY IN THE CRIMINAL COURT OF THE CITY OF NEW YORK 19 (1983).

[24] *Id.* at 3.

[25] Steven Zeidman, *Policing the Police: The Role of the Courts and the Prosecution*, 32 FORDHAM URB. L.J. 315, 321 n.35 (2005) (citing statistics from the New York State Division of Criminal Justice Services, Bureau of Justice Research and Innovation).

IV. RESOLUTION OF THE SPLIT AMONG THE CIRCUITS IS WARRANTED BECAUSE THE SPLIT UNDERMINES THE RULE OF LAW BY INTERFERING WITH THE ABILITY OF IMMIGRANTS TO MAKE DECISIONS CONCERNING THE RESOLUTION OF MINOR CRIMINAL CHARGES THAT MAY HAVE PROFOUND IMMIGRATION CONSEQUENCES

The circuit split, coupled with DHS detention transfer policies, makes it extremely difficult to predict what consequences will follow from a guilty plea or a decision to go to trial. As a result of the split, a non-citizen convicted of a misdemeanor drug possession offense may be subject to drastically different consequences depending solely upon where she is detained. Without uniformity in the interpretation of the term "aggravated felony," stability and predictability within the legal system become elusive concepts to non-citizens and advocates struggling to make informed choices at the intersection of immigration and criminal law.

Amici are organizations that serve defense attorneys whose clients could face removal and other severe immigration consequences as a result of a criminal disposition by guilty plea or trial conviction. In order to properly counsel immigrant clients about the relative advantages and disadvantages of taking a plea, criminal defense attorneys must be fully informed about the implications that a conviction may have for the non-citizen's immigration status. Part of amici's mission is to train attorneys to give sound legal advice to their clients, including non-citizen clients. The split among the circuits makes it very difficult for amici to carry out this task because there is no guarantee that non-citizens will face removal proceedings in the same jurisdiction where they reside or are convicted of a crime.

Attorneys serving indigent defendants, the prosecutors who try their cases, and the judges who hear them all carry massive caseloads. The over-burdened criminal court system usually

depends on all but a handful of cases being disposed of through plea bargains. Advocates may have only minutes to talk to their clients before a hearing at which a plea can be taken; it is essential for attorneys to have clear rules to govern the advice they provide, especially when the potential immigration consequences far outweigh the penal consequences.

The specific experience of amicus IDP further illustrates how the current split in the circuits interferes with efforts to provide sound legal advice to immigrants in the criminal justice system. Part of IDP's mission is to provide information to immigrant defendants and their attorneys in order to assist them in making decisions that may have drastic immigration consequences. IDP runs a hotline that receives more than 1,000 calls per year from immigrants and advocates. Many of these calls involve questions about the potential consequences of a guilty plea in misdemeanor cases. This decision presents a minefield of potential problems for those immigrants if their convictions are considered "aggravated felonies." Given the current split among the circuits in interpreting the term, however, IDP struggles to advise such callers, because it cannot predict what law might apply to their case.

Amici serve non-citizens with past convictions as well as non-citizen defendants facing pending criminal charges. These individuals seek advice regarding a host of immigration-related decisions. For example, they often seek advice about whether or not to file for naturalization, whether or not to leave the country in order to visit family elsewhere, and whether or not to apply for a replacement green card. A lawful permanent resident with U.S. citizen children and a U.S. citizen spouse may call seeking advice about whether or not she should leave the country in order to visit a dying parent. If she has a past misdemeanor drug possession conviction, she could be deemed inadmissible upon her return. If placed in detention upon her attempted return to the United States, she might be transferred to any detention facility in the country,

and it is impossible to know whether her drug possession conviction will render her ineligible for the discretionary relief from removal that her compelling circumstances might otherwise afford her. A stable and uniform definition of the term "aggravated felony" is necessary for defense attorneys and immigrant advocates to advise immigrants who are making decisions that could have life-altering consequences for themselves and their families.

CONCLUSION

For the foregoing reasons, amici respectfully submits that the petition for the writ of certiorari should be granted.

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Supreme Court of the United States

ALBERTO SANCHEZ VILLALOBOS,
A/K/A ALBERTO VILLALOBOS SANCHEZ,
A/K/A FRANCISCO SANCHEZ SAENZ,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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This case presents the question whether a state-law conviction—here, misdemeanor possession of codeine, for which Petitioner was sentenced to 60 days—is a "drug trafficking" crime and, therefore, an "aggravated felony" under 8 U.S.C. § 1101(a)(43)(B).

The Government does not dispute that there is a conflict within the courts of appeals on this question, nor could it. To the contrary, the Government signals that this issue is in need of the Court's resolution. Opp. 8-9 n.4.

In fact, and as the petition explained, there are deep and growing conflicts within the courts of appeals on this and related questions. On the threshold issue—the methodology for determining whether a state-law conviction is a "drug trafficking" crime and, therefore, an "aggravated felony"—the courts of appeals are divided between two competing approaches. Indeed, there are growing splits *within* each of those approaches. The present case provides this Court an ideal opportunity to resolve the confusion in the courts of appeals on these important and recurring questions.

The Government's arguments for denial of the writ are without merit. Although the Government suggests that this case presents a poor vehicle because it arises in the sentencing (rather than immigration) context, the Government's argument is directly contrary to the position that it has repeatedly taken in the courts of appeals. For similar reasons, the guidance of *Braxton* v. *United States*, 500 U.S. 344 (1991), is inapplicable. And the Government's suggestion that the case is moot (Opp. 5-8) is flatly contradicted by controlling Supreme Court precedent. *See United States* v. *Campos-Serrano*, 404 U.S. 293, 294 n.2 (1971).

1. This case turns on the meaning of a provision of the United States Code, § 1101(a)(43)(B) of Title 8, which defines what constitutes a drug trafficking crime and, therefore, an aggravated felony. The term "aggravated felony" is controlling in two different contexts; in both contexts the definition in § 1101(a)(43) controls. First, the determination that an individual has been convicted of an "aggravated felony" carries a number of consequences under the federal immigra-

tion laws. *See, e.g.*, 8 U.S.C. § 1227(a)(2)(A)(iii) (alien who has been convicted of an "aggravated felony" as defined in § 1101(a)(43) is removable). Second, a person who is convicted of an "aggravated felony" is subject to increased punishment for criminal illegal reentry. In particular, the illegal reentry statute, 8 U.S.C. § 1326(b)(2), increases the statutory maximum (from two to twenty years) for an alien who has previously been convicted of an "aggravated felony," *see generally Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998) (considering whether conviction of an "aggravated felony" under § 1326(b)(2) is an element of the offense); the statute is clear that, for purposes of the illegal reentry statute, "aggravated felony" is defined by § 1101(a)(43). *See* 8 U.S.C. § 1101(a) (definitions of § 1101(a)(1)-(50) are "for purposes of this chapter [12]," which includes § 1326). In exactly the same manner, the illegal reentry sentencing provision creates a sentencing enhancement for an alien who has previously been convicted of an "aggravated felony" and, paralleling the statute, expressly states that aggravated felony shall have the same meaning as in § 1101(a)(43). USSG 2L1.2 & Application Note 3 (the term "aggravated felony" in USSG 2L1.2(b)(1)(C) "has the meaning given that term in 8 U.S.C. § 1101(a)(43)").

In both the immigration and sentencing contexts, therefore, the question presented is one and the same: whether a particular offense falls within the scope of § 1101(a)(43)(B). The Government, however, attempts to minimize the divisions among the circuits by walling off the two contexts and discussing only those decisions that, like the one below, arise under the sentencing laws. *See* Opp. 11 ("The variations in the approaches taken by courts of appeals that petitioner identifies are not sufficiently substantial *in the Sentencing Guidelines context* . . . to warrant this Court's review." (emphasis added)); Opp. 11-13 & n.6 (limiting discussion to sentencing context). The Government even suggests that § 1101(a)(43)(B) might carry a *different* meaning depending on the context in which it is used. Opp. 8 n.4 ("A number of courts have recognized that the definition of 'aggravated fel-

ony' for criminal sentencing purposes may differ from the definition employed . . . in immigration proceedings.").

This approach is directly contrary to the position that the Government has taken in the courts of appeals. In those cases, the Government has repeatedly argued that the meaning of § 1101(a)(43)(B) is the *same* in both the immigration and sentencing contexts. Indeed, it has stated that there is no tenable argument to the contrary. As the Government stated forcefully in a brief filed in the Second Circuit less than three weeks ago: "There is no basis for treating the definition of 'aggravated felony' differently based on whether it is used in the immigration or criminal sentencing context." Brief for Respondents, *Martinez* v. *Ridge*, No. 05-3189, at 22 (2d Cir. Dec. 7, 2005);[1] *see also* Brief for Respondent, *Cazarez-Gutierrez* v. *Ashcroft*, No. 02-72978, 2003 WL 22752434, at *18 (9th Cir. June 9, 2003) ("In both the sentencing and immigration contexts . . . the very same statutory provision governs. . . . To say that a given statute has inconsistent meanings when applied in different contexts is untenable."); Brief for the United States, *United States* v. *Hernandez-Avalos*, No. 00-50186, 2000 WL 33980051, at *13 (5th Cir. Oct. 9, 2000) ("[T]here is no viable distinction between the sentencing guidelines and the Immigration and Nationality Act for purposes of interpreting the definitions of 'aggravated felony' and 'drug trafficking crime.'").

In Petitioner's view—and apparently, the Government's as well—§ 1101(a)(43)(B) has a single meaning, and resolving its meaning in the present case would decide the issue in the immigration context as well. *Cf. Clark* v. *Martinez*, 125 S. Ct. 716, 722-723 (2005) ("To give the[] same words a different meaning for each category would be to invent a statute rather than interpret one.").

2. For the same reasons, the Government is plainly incorrect in contending (Opp. 9) that this case "solely concerns

[1] For the Court's convenience, Petitioner has sought permission to lodge the Government's brief in *Martinez* with the Clerk of the Court.

the court's interpretation and application of the Sentencing Guidelines." Just as in the immigration context, this case turns entirely on the meaning of a federal *statute*, § 1101(a)(43)(B).

Accordingly, the principle of *Braxton* v. *United States*, 500 U.S. 344 (1991), is inapposite. In that case, the Court set forth a discretionary principle that cautions "restrain[t] and circumspect[ion] in using [the] certiorari power as the primary means" of resolving inter-circuit conflict about the meaning of sentencing provisions. *Id.* at 348. Such restraint, however, is misplaced and improper where, as here, the conflict among the circuit courts concerns the proper construction of a federal statutory provision. *See Neal* v. *United States*, 516 U.S. 284, 290, 295 (1996) (noting that interpretation of a federal statute is the province of the federal courts, not the Sentencing Commission; resolving meaning of statute in case involving guidelines provision).

That the outcome of this case depends on the meaning of § 1101(a)(43)(B) is plain from an examination of the approach employed both by the court below and by the other circuits to have addressed this issue. After explaining that under the commentary to USSG 2L1.2, "'aggravated felony' has the meaning given that term in [§ 1101(a)(43)]," the Fifth Circuit proceeded to examine the text of, and precedents interpreting, § 1101(a)(43)(B) and related statutes. Pet. App. 3a-7a. This analytical approach is typical of the cases addressing this guidelines provision. *See, e.g.*, *United States* v. *Robles-Rodriguez*, 281 F.3d 900, 902-905 (9th Cir. 2002) (stating that "'[a]ggravated felony' is a term of art created by Congress" and surveying immigration and sentencing cases to determine meaning of § 1101(a)(43)(B); "The crucial issue, therefore, is whether the convictions are 'felonies' as that term is used in the federal statutes at issue here."); *United States* v. *Pornes-Garcia*, 171 F.3d 142, 145-146 & n.1 (2d Cir. 1999) (noting that Sentencing Commission "conform[ed]" the term "aggravated felony" in USSG 2L1.2 to the "definition in the Immigration and Nationality Act," and

therefore construing "the statutory definition of aggravated felony" in § 1101(a)(43)(B)).[2]

Indeed, as a litigant in the courts of appeals, the Government itself consistently treats this issue as an interpretation of the federal statutes referenced in the guidelines provision. *See, e.g.*, Brief for Appellees, *United States* v. *Wilson*, No. 02-4202, 2002 WL 32728386, at *24 (4th Cir. June 17, 2002) (noting 2L1.2 commentary that "'aggravated felony' has the meaning given that term in [§ 1101(a)(43)]"; "Thus, it is that statute which the Court must construe.").

3. The Government does not dispute the existence of significant conflicts in the courts of appeals; nor does it argue that Petitioner has mischaracterized any of these conflicts. Rather, and somewhat surprisingly, the Government argues that this case does not *implicate* these splits. Specifically, the Government argues that, under the facts of this case—involving a misdemeanor conviction for possession of codeine—no court of appeals would have held that Petitioner's conviction was *not* an aggravated felony. Opp. 11.

This is simply incorrect. The Government can advance this assertion only by ignoring interpretations of § 1101(a)(43)(B) in the *immigration* context, *see supra* p. 2, or by attempting to predict how the circuit courts might decide open questions of law in the future. Indeed, a careful examination of existing law indicates that Petitioner would have prevailed in at least five circuits. Petitioner would have prevailed in the Third and Sixth Circuits—the two circuits that look only to whether the conduct would be a felony under federal law (Pet. 8-10)—as it is undisputed that Petitioner's codeine possession would not have constituted a fel-

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[2] *See also United States* v. *Amaya-Portillo*, 423 F.3d 427, 430-435 (4th Cir. 2005) (stating that construing 2L1.2(b)(1)(C) "entails the interpretation of a statute"; construing § 1101(a)(43)(B) and related statutes); *United States* v. *Palacios-Suarez*, 418 F.3d 692, 695-699 (6th Cir. 2005) (in sentencing case, engaging in extensive analysis of plain language and legislative history of § 1101(a)(43)(B) and related statutes).

ony under federal law.[3] And Petitioner would have also prevailed in the Fourth, Tenth, and Eleventh Circuits, as these circuits rely on the *state classification* of the offense (Pet. 14); as such, Petitioner's state-law "misdemeanor" conviction would not have been deemed a "felony" in these circuits.[4]

4. In fact, this case presents an ideal vehicle, because it would permit the Court to decide not only the threshold conflict, but two subsidiary conflicts that have also divided the courts of appeals.

As the petition explained (Pet. 8-11), the courts of appeals are divided (6-2-2) on the threshold question whether a state-law conviction is a "drug trafficking" crime and, therefore, an "aggravated felony" under § 1101(a)(43)(B). Six courts of appeals have adopted one methodology, two have adopted another, and two others have added to the confusion by adopting *different* approaches depending on the context.

Within each of these approaches, there are deep and growing splits. First, there is a 4-2 conflict in the courts of appeals regarding whether, using a recidivist enhancement, the Government can "add" two state-law convictions (here,

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[3] Nor would his prior conviction have turned his misdemeanor into a felony in these circuits: the Third Circuit has held that recidivist enhancements may not be considered unless certain procedures are followed, *Steele* v. *Blackman*, 236 F.3d 130, 137-138 (3d Cir. 2001), and the Sixth Circuit has not squarely addressed this issue, *Palacios-Suarez*, 418 F.3d at 700 (stating in dicta that state drug offense "could be a federal felony" under recidivist provision but not deciding the issue). The Government ignores the Third Circuit decision (because it is in the immigration context) and takes the Sixth Circuit's dicta in *Palacios-Suarez* as a holding. Opp. 12, 13 n.6.

[4] These circuits have not decided the recidivist-enhancement issue (*i.e.*, whether the federal recidivist provision may turn two misdemeanors into a "felony") and, as a result, would not have concluded under current law that Petitioner's conviction was a felony under federal law. The Government acknowledges that Petitioner might have prevailed in the Fourth Circuit (Opp. 12 n.5), relies on an unpublished Tenth Circuit case in a different context (Opp. 12 (citing *United States* v. *Miramontes-Lamas*, No. 97-4130, 1998 WL 50955, at *1 (10th Cir. Feb. 9, 1998) (applying a *state-law* recidivist provision))), and completely ignores the Eleventh Circuit.

two state-law misdemeanors) to create a federal "felony." Pet. 11-13. It is our view that, taken together, *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998), and *Taylor* v. *United States*, 495 U.S. 575 (1990), dictate that this is impermissible. Pet. 16-18.[5] Moreover, in light of developments since *Almendarez-Torres*, the Court could decide that principles of constitutional avoidance require that Petitioner's prior state-law misdemeanor conviction may not be used to convert his second misdemeanor into a federal felony. *Cf. Jones* v. *United States*, 526 U.S. 227, 251-252 (1999). In any event, regardless of the ultimate resolution of the question, this conflict is in need of the Court's resolution.

Second, for those circuits that look to whether a crime would be a felony under state law, the courts of appeals are divided (6-2) regarding whether the state's classification of the offense (*i.e.*, "misdemeanor" or "felony") or the maximum length of imprisonment under state law (*i.e.*, whether more than one year) should control. Pet. 13-14.

The present case would permit the Court to consider all three of these conflicts. *Cf.* Petition for Writ of Certiorari, *Lopez* v. *Gonzales*, No. 05-547, at i (filed Oct. 31, 2005) (in case involving single state-law felony that carried maximum punishment of ten years, presenting only the threshold question of methodology for determining whether a state-law conviction is an aggravated felony). It would also permit the Court to consider these questions during the current Term, and in the context of a state-law misdemeanor.

5. Finally, although the Government spends many pages *implying* that the case may be moot (Opp. 5-8), the Government never in fact states that this is so. The reason for this is simple: this Court has already decided the mootness question in Petitioner's favor in *United States* v. *Cam-*

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[5] The Government's only response (Opp. 13-14) is to read these two cases in isolation. The Government does not address any of Petitioner's arguments relating to the other two Questions Presented. *See* Pet. 14-16, 18-19.

pos-Serrano, 404 U.S. 293 (1971), a case that is factually indistinguishable from this one.

In *Campos*, the defendant, an undocumented alien, received a suspended sentence and three years probation. The court imposed one—and only one—condition of probation: that he "not return to the United States illegally." App. 5a.[6] The defendant was then deported to Mexico.

This Court had little difficulty concluding that the case presented a live controversy under Article III:

> The sentence was suspended, and the respondent was placed on probation for three years "on condition that he return to Mexico and not return to the United States illegally." Pursuant to this sentence, he was remanded to the custody of the Immigration and Naturalization Service for deportation under a previous order. It appears that he is now in Mexico. *Clearly, the fact that the respondent is now out of the country does not render this case moot. He is still under the sentence of the District Court and on probation subject to conditions imposed by the District Court.* Should he violate those conditions, he will be subject to imprisonment under his continuing criminal sentence.

Campos, 404 U.S. at 294 n.2 (emphasis added). Thus, even though the defendant had been deported and was subject only to the condition that he not return illegally, the Court stated that there was a live controversy because "he is living under those restraints today." *Id.*

Because Petitioner in the present case is under a term of supervised release that includes the same condition as in *Campos*, the holding of *Campos* controls the mootness inquiry here. In fact, Petitioner's case presents a more signifi-

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[6] For the Court's convenience, excerpts from the Appendix in *Campos* are included as an Appendix to this Reply; Petitioner has sought permission to lodge the complete *Campos* Appendix with the Clerk of the Court.